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No. 80-223

In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD D. HOWE, ET AL., PETITIONERS

v.

ALLIED VAN LINES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the United States, through the Department of Defense, cannot contract with common carriers to limit the carriers' liability for loss of the goods of military personnel, shipped on a government bill of lading at government expense, without approval of the Interstate Commerce Commission pursuant to 49 U.S.C. 20(11),[1] despite another provision in the Interstate Commerce Act (49 U.S.C. 22(1)) which states that

*The United States was a third party defendant in four of the 12 cases consolidated for decision by the court of appeals (Pet. App. A24-A27).

[1]The Interstate Commerce Act has been recodified at 49 U.S.C. (Supp. II) 10101-11916. Our references will be to the earlier codification, as in the opinion of the court of appeals and the petition, since these cases arose prior to recodification (Pet. App. A29 n.1).

"[n]othing in this chapter shall prevent the carriage * * * of property free or at reduced rates for the United States * * *."

1. Petitioners[2] are or were military personnel who had their household goods shipped by the government at its expense through common carriers, pursuant to their statutory entitlement under 37 U.S.C. 406. The goods were shipped on government bills of lading at rates lower than those available to the general public (Pet. App. A28-A29). These lower rates were established in Military Rate Tender No. 1-H, ICC No. 35 ("MRT 1-H"), which contains the continuous offer of some 1,500 common carriers to ship such goods, but also limits the carriers' liability for loss or damage to 60 cents per pound per article, absent a higher declared value and higher rate.

Petitioner Howe was specifically advised of and acknowledged the carrier's limited liability; he was also advised of his right to claim up to $15,000 from the United States for losses above the carrier's liability pursuant to 31 U.S.C. 241-243 (Pet. App. A30). In addition, petitioner Howe purchased insurance of $25,000 from a private company to cover any loss not protected by the limited liability of the common carrier and the United States. Petitioner's household goods were destroyed as a result of an accident during shipment. He has been or can be made whole for his loss from the combined liability of the common carrier, the United States, and his private insurance company (*ibid.*).

Petitioner Howe sued the carrier, respondent Allied Van Lines, under 49 U.S.C. 20(11), for the full value of

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[2]The court of appeals treated the factual circumstances of petitioner Howe's case as typical of the others (Pet. App. A29). We will do likewise. The district court in petitioner Howe's case adopted the parties' lengthy stipulation of facts (Pet. App. A1, A9-A10).

his destroyed household goods. Allied had accepted petitioner's goods from the Military Traffic Management Command (MTMC), as shipper, on a government bill of lading (Pet. App. A30). Obviously, it is petitioner's private insurance company, subrogated to his claim, that is interested in imposing full liability on the common carrier (*ibid.*).[3]

The district court granted judgment in favor of Allied and the other common carriers, upholding their claims of limited liability under their rate tender with the government (MRT 1-H) (Pet. App. A1-A23). The court of appeals affirmed (Pet. App. A28-A52; 622 F. 2d 1147).

2. The decision below is correct and does not conflict with any decision of this Court or other courts of appeals. In a careful and thorough opinion, the court of appeals reviewed the legislative history of the pertinent provisions of the Interstate Commerce Act and concluded that petitioners' claims are without merit (Pet. App. A31-A48). It also reviewed the principal cases relied upon by petitioners and correctly concluded that those cases do not support petitioners' argument (Pet. App. A44-A50). Accordingly, we submit that there is no reason for further review by this Court.

a. The court of appeals held that under 49 U.S.C. 22 the government is free to contract with common carriers for reduced transportation rates and concomitant declared value limitations without obtaining the approval of the Interstate Commerce Commission, notwithstanding 49 U.S.C. 20(11), which provides that Commission

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[3]Insurance companies were parties to some of the cases below and are petitioners here (Pet. App. 1 n.*). The court of appeals acknowledged that some individual service members also may be interested in a possible recovery against the carriers (Pet. App. A31).

approval is generally required for declared value limitations to be valid.[4]

As correctly noted by petitioners, "[t]he Department of Defense is the nation's single largest shipper of household goods" (Pet. 7). This is so because Congress has provided that military personnel are "entitled to transportation * * * of * * * household effects * * * subject to [certain] conditions and limitations * * * prescribed by the Secretaries concerned * * * ." 37 U.S.C. 406(b) and (c). Pursuant to this congressional authorization, the Secretary of Defense has promulgated regulations that provide that the Military Traffic Management and Terminal Service (now the Military Traffic Management Command) shall:

> Be the sole negotiator, worldwide, with U.S. household goods carriers and storage firms *on rates and all other matters incidental* to the transportation and storage of personal property.

32 C.F.R. 173.4(c)(9) (1978) (emphasis added). These regulations have the force of law. *Public Utilities Comm'n of California* v. *United States*, 355 U.S. 534, 542 (1958).

This Court has acknowledged that Congress has granted the military departments broad authority to negotiate with commercial carriers for the most favorable transportation rates obtainable, free of state regulation. *Public Utilities Comm'n of California* v. *United States*, *supra*, 355 U.S. at 543; *United States* v. *Georgia Pub. Serv. Comm'n*, 371 U.S. 285, 292-293 (1963). The Court

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[4]Contrary to petitioners' assertion (Pet. 7), the court of appeals did not seek to imply an exception to a statute, as was attempted in *United States* v. *Rutherford*, 442 U.S. 544 (1979). The court of appeals simply sought to give effect to the Interstate Commerce Act as a whole, including 49 U.S.C. 22, which petitioners would have this Court ignore.

has also explicitly stated that 49 U.S.C. 22 "exempts transportation for the United States from the rate provisions of [the Interstate Commerce] Act." 355 U.S. at 543 n.10. See also *Transportation of Government Traffic,* 131 M.C.C. 845, 857 (1979). As the court below concluded (Pet. App. A48), "[a] government shipper, exempted under section 22, who agrees to a declared value, * * * acts as a self-insurer in order to seek a rate concession to relieve the carrier of part of the risk of loss. Thus, since a government shipper may lawfully exact a discriminatory rate, there is no reason to require adherence to the antidiscrimination released value provisions of section 20(11)."[5]

Even before enactment of the Interstate Commerce Act, this Court recognized that "[t]he rate of freight is indissolubly bound up with the valuation * * * ," and refused to allow a shipper to recover the claimed full value of horses lost in shipment where the rate was set on the basis of maximum values specified in the bill of lading. *Hart* v. *Pennsylvania R.R.,* 112 U.S. 331, 337 (1884). This principle was reiterated long after passage of the Act as well:

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[5]Petitioners' reliance on Section 5(b)(4)(C) of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 795 (Pet. 16-17; Pet. App. A70), as evidence of a contrary intent, is groundless. That provision does nothing more than continue the requirement that carriers of household goods for the government obtain a certificate of public convenience and necessity. It has nothing to do with the issue presented here. Section 12 of the Act, 94 Stat. 802 (Pet. 17; Pet. App. A73) is equally irrelevant, since that section does not relate to the authority of the government to contract for reduced rates under 49 U.S.C. (Supp. II) 10721, the successor to Section 22. In addition, we fail to perceive how the congressional intent embodied in this subsequently enacted legislation lends any support to petitioners' construction of the provisions of the Interstate Commerce Act at issue here.

> Having accepted the benefit of the lower rate dependent upon the specified valuation, the respondent [shipper] is estopped from asserting a higher value. To allow him to do so would be to violate the plainest principles of fair dealing.

American Ry. Express Co. v. *Lindenburg*, 260 U.S. 584, 592 (1923). The court of appeals' construction of the Interstate Commerce Act is fully consistent with this settled principle.

b. There is no conflict among the courts of appeals on the issue urged by petitioners. *Anton* v. *Greyhound Van Lines, Inc.*, 591 F. 2d 103 (1st Cir. 1978), on which they principally rely to show such a conflict, turned on the absence of a specific limitation of value in the bill of lading and the supposed absence of any agreement to such a limitation by the owner of the goods or the military branch. Here, petitioner Howe was explicitly advised of the carrier's limited liability and the bill of lading contained such a limitation. Moreover, the critical issue in this case is the impact of 49 U.S.C. 22 on the carrier's liability. As shown above, the court of appeals correctly held that Section 22 permitted the carrier to limit its liability in its agreement with the United States. Since, as the court below noted (Pet. App. A49), the impact of Section 22 was not even addressed by the First Circuit in *Anton*, it is clear that there is no conflict for this Court to resolve.[6]

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[6]The efforts of three of the petitioners (Pet. 10-11) to base their claim on the supposed absence of a written limitation of liability is unavailing. As petitioners concede (Pet. 4), these cases were decided in the district court and the court of appeals on the understanding that petitioner Howe's factual circumstances were typical of all petitioners (Pet. App. A1, A9, A29-A31). Petitioners' efforts to urge factual distinctions thus come too late. In addition, each of the bills

In short, the result urged by petitioners is contrary to Congress' intent in enacting Section 22 and would seriously hamper the government's ability to transport economically and efficiently the myriad goods essential to its operation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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of lading involved incorporates the terms of the carriers' rate tenders, which expressly refer to the released value limitation of 60 cents per pound per article. See Briefs in Opposition of Respondents American Red Ball Transit Co., Inc. and Engel Van Lines, Inc., at 6-7.

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